

Add Chapter 11 (commencing with Section 30491) to Part 13 of Division 2 to the Revenue and Taxation Code to limit litigation costs, including attorneys' fees, under the Cigarette and Tobacco Products Tax Law in the same manner that litigation costs are limited under the Sales and Use Tax Law. This same provision would be added to the property tax law, the Franchise and Income Tax Law, and all of the Board-administered special tax and fee programs. In addition, Section 7156 of the Sales and Use Tax Law would be moved to its own chapter.

Source: Legal Department

Existing Law

Since 1988, litigation costs awarded to prevailing taxpayers in litigation under the Sales and Use Tax Law have been limited pursuant to Revenue and Taxation Code Section (Section) 7156. Section 7156 limits the Board of Equalization's (Board) exposure to such litigation costs by, among other things, requiring a prevailing taxpayer to establish "that the position of the State of California in the civil proceeding was not substantially justified" and, even where this is established, generally limiting the court's award of attorneys' fees to \$75 per hour. There is no similar provision in the property tax law or in any of the special tax and fee programs administered by the Board.

In addition, Section 19717 provides a limitation on litigation costs involving the Franchise and Income Tax Law, but its scope and effect are not clear where litigation involves the Board.

Background

In a recent case involving a claim for refund of approximately \$68,000 in cigarette taxes (*Parmar v. SBOE*, Los Angeles Superior Court), the taxpayer's counsel filed a claim for over \$1.3 million in attorneys' fees. The trial court awarded the refund to the taxpayer, but it has not yet made any decision on the award of litigation costs, including attorneys' fees, to the taxpayer. The Board has appealed both the refund decision and any potential award of attorneys' fees.

This Proposal

This proposal would limit the Board's exposure to such disproportionate litigation costs in future litigation cases involving the Board by adding a provision, based on Section 7156, to limit the award of litigation costs, including attorneys' fees, to prevailing taxpayers or fee payers in litigation under the Franchise and Income Tax Law (Part 10.2) and all of the special tax and fee programs administered by the Board, including, in addition to the Cigarette and Tobacco Products Tax Law (Part 13), the Motor Vehicle Fuel Tax Law (Part 2), the Use Fuel Tax Law (Part 3), the Tax on Insurers Law (Part 7), the Alcoholic Beverage Tax Law (Part 14), the Energy Resources Surcharge Law (Part 19), the Emergency Telephone Users Surcharge Law (Part 20), the Hazardous Substances Tax Law (Part 22), the Integrated Waste Management Fee Law (Part 23), the Oil Spill Response, Prevention, and Administration Fees Law (Part 24), the Underground Storage Tank Maintenance Fee Law (Part 26), the Fee Collection Procedures Law (Part 30), and the Diesel Fuel Tax Law (Part 31) of Division 2 of the Revenue and Taxation Code. This provision would also be added to the property tax law, in Part 1 of Division 1 of the Revenue and Taxation Code. The table below sets forth the specific sections that will be added to each law.

Table of Laws and the Provisions to be Added to the Revenue and Taxation Code

LAW	DIVISION	PART	NEW CHAPTER	SECTION
Property Tax	1	1	Chapter 3.5	180
Motor Vehicle Fuel Tax Law	2	2	Chapter 11.5	8451
Use Fuel Tax Law	2	3	Chapter 10	9371
Tax on Insurers Law	2	7	Chapter 11	13191
Franchise and Income Tax Law	2	10.2	Chapter 9.01	19722
Cigarette and Tobacco Products Tax Law	2	13	Chapter 11	30491
Alcoholic Beverage Tax Law	2	14	Chapter 12	32571
Energy Resources Surcharge Law	2	19	Chapter 8	40231
Emergency Telephone Users Surcharge Law	2	20	Chapter 8	41190
Hazardous Substances Tax Law (includes Hazardous Waste, CLPP, and OLPP fees)	2	22	Chapter 10	43701
Integrated Waste Management Fee Law	2	23	Chapter 10	45991
Oil Spill Response, Prevention, and Administration Fees Law	2	24	Chapter 10	46771
Underground Storage Tank Maintenance Fee	2	26	Chapter 9	50171
Fee Collection Procedures Law (includes Covered Electronic Waste Recycling Fee, California Tire Fee, Marine Invasive Species Fee, Natural Gas Surcharge, and Water Rights Fee)	2	30	Chapter 9	55391
Diesel Fuel Tax Law	2	31	Chapter 12	60731

This proposal would also include two uncoded sections. The first would make the statutes added by the bill applicable to all pending proceedings and retroactive to the extent permitted by the California Constitution. The second would make the statutes added by the bill the exclusive means by which litigation costs and attorneys' fees may be awarded under the property tax law, the Franchise and Income Tax Law, and each of the special tax and fee programs.

Chapter 11 (commencing with Section 30491) is added to Part 13 of Division 2 of the Revenue and Taxation Code, to read:

Chapter 11. Civil Proceedings

30491. (a) In the case of any civil proceeding which is—

(1) Brought by or against the State of California in connection with the determination, collection, or refund of any tax, interest, or penalty under this part, and

(2) Brought in a court of record of this state, the prevailing party may be awarded a judgment for reasonable litigation costs incurred in that proceeding.

(b)(1) A judgment for reasonable litigation costs shall not be awarded under subdivision (a) unless the court determines that the prevailing party has exhausted the administrative remedies available to that party under this part.

(2) An award under subdivision (a) shall be made only for reasonable litigation costs which are allocable to the State of California and not to any other party to the action or proceeding.

(3) No award for reasonable litigation costs may be made under subdivision (a) with respect to any declaratory judgment proceeding.

(4) No award for reasonable litigation costs may be made under subdivision (a) with respect to any portion of the civil proceeding during which the prevailing party has unreasonably protracted that proceeding.

(c) For purposes of this section—

(1) The term “reasonable litigation costs” includes any of the following:

(A) Reasonable court costs.

(B) Based upon prevailing market rates for the kind or quality of services furnished any of the following:

(i) The reasonable expenses of expert witnesses in connection with the civil proceeding, except that no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the State of California.

(ii) The reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party’s case.

(iii) Reasonable fees paid or incurred for the services of attorneys in connection with the civil proceeding, except that those fees shall not be in excess of seventy-five dollars (\$75) per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceeding, justifies a higher rate.

(2)(A) The term “prevailing party” means any party to any proceeding described in subdivision (a) (other than the State of California or any creditor of the taxpayer involved) which—

(i) Establishes that the position of the State of California in the civil proceeding was not substantially justified, and

(ii)(I) Has substantially prevailed with respect to the amount in controversy, or

(II) Has substantially prevailed with respect to the most significant issue or set of issues presented.

(B) Any determination under subparagraph (A) as to whether a party is a prevailing party shall be made—

(i) By the court, or

(ii) By agreement of the parties.

(3) The term “civil proceeding” includes a civil action.

(d) For purposes of this section, in the case of—

(1) Multiple actions which could have been joined or consolidated, or

(2) A case or cases involving a return or returns of the same taxpayer which could have been joined in a single proceeding in the same court, these actions or cases shall be treated as one civil proceeding regardless of whether the joinder or consolidation actually occurs, unless the court in which the action is brought determines, in its discretion, that it would be inappropriate to treat these actions or cases as joined or consolidated for purposes of this section.

(e) An order granting or denying an award for reasonable litigation costs under subdivision (a), in whole or in part, shall be incorporated as a part of the decision or judgment in the case and shall be subject to appeal in the same manner as the decision or judgment.

(f) For purposes of this section, “position of the State of California” includes either of the following:

(1) The position taken by the State of California in the civil proceeding.

(2) Any administrative action or inaction by the State Board of Equalization (and all subsequent administrative action or inaction) upon which that proceeding is based.

SEC 2. All statutes added or otherwise addressed by this bill shall apply to all pending proceedings brought by or against the State Board of Equalization under the tax, surcharge, and fee laws to which they relate and shall be retroactive to the extent permitted by the California Constitution.

SEC 3. The statutes added or otherwise addressed by this bill are the exclusive means by which litigation costs and attorneys’ fees may be awarded against the State Board of Equalization in litigation cases brought under the tax, surcharge, and fee laws to which they relate. It is the intent of the Legislature that these statutes shall be the exclusive means by which attorneys’ fees may be awarded against the State Board of Equalization in tax, surcharge, and fee refund and other litigation cases. Except as provided below, no award of litigation costs or attorneys’ fees under any other statute or legal theory may be made for an action for refund of an amount collected as tax, surcharge, or fee or any other action brought in connection with the tax, surcharge, and fee laws under the Revenue and Taxation Code. The provisions of the statutes added or otherwise addressed by this bill are specifically intended to overturn the rulings of the courts of appeal in *Agnew v. SBE* (2005) 134 Cal.App.4th 899 and *Northwest Energetic Services LLC v. FTB* (2008) 159 Cal.App.4th 841 to the extent those rulings are inconsistent with this bill. Notwithstanding the preceding statements, nothing in this bill is intended to affect the award of attorneys’ fees pursuant to Revenue and Taxation Code Sections 1611.6, 2955, 3006, 4807, 5152, and 19717.